Supreme Court, U. S.
FILED
JAN 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-532

CONSOLIDATION COAL COMPANY, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

ANTHONY J. POLITO
ROGER CURRAN
900 Oliver Building
Pittsburgh, Pa. 15222
Counsel for Petitioner

Of Counsel:

WILLIAM J. MELVIN
50 West Broad Street
Columbus, Ohio 43215

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX TO PETITIONER'S REPLY MEMORANDUM

	PAGE
Argument	1
1. The Sixth Circuit's Decision Is In Direct Conflict With *Michigan v. Tyler*	2
2. The *Aguilar-Spinelli* Test	4
3. Warrantless Search	5
Conclusion	7

TABLE OF CITATIONS

CASES	PAGE
Aguilar v. *Texas*, 378 U.S. 108 (1964)	1
Bumper v. *North Carolina*, 391 U.S. 543 (1968)	7
Colonnade Catering Corp. v. *United States*, 397 U.S. 72 (1970)	1, 6
Michigan v. *Tyler*, 436 U.S. —, 98 S.Ct. 1942 72 (1970)	1, 6
Spinelli v. *United States*, 393 U.S. 410 (1969)	1, 5
United States v. *Biswell*, 406 U.S. 311 (1972)	1, 6
United States v. *Consolidation Coal Company*, 560 F.2d 214 (6th Cir. 1977)	2, 5, 6
United States v. *Goldfine*, 538 F.2d 815 (9th Cir. 1976)	3
United States v. *Harris*, 403 U.S. 573 (1971)	5
United States v. *Prendergast*, 585 F.2d 69 (3d Cir. 1978)	3

STATUTES	
21 U.S.C. § 880	3
30 U.S.C. § 818	6
30 U.S.C. § 819(a)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-532

CONSOLIDATION COAL COMPANY, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITIONER'S REPLY MEMORANDUM

ARGUMENT

While making a brief comment on *Michigan v. Tyler*[1] in footnote 13 of the Brief in Opposition,[2] the Government has made no effort to refute petitioner's contention that the Sixth Circuit's decision is in direct conflict with the holding of this Court in *Tyler*. Instead, it argues that, "regardless of the correctness of the court of appeals' conclusion . . ." (pp. 15-16), certiorari should nonetheless be denied for the following [in our view unsupportable] reasons: (1) the search warrant affidavits in question satisfied the *Aguilar-Spinelli*[3] test; and (2) alternatively, a warrantless search was permissible under the holdings in the *Biswell*[4] and *Colonnade*[5] cases.

---

1. 436 U.S. ___, 98 S.Ct. 1942 (1978).

2. Brief in Opposition at 16.

3. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

4. *United States v. Biswell*, 406 U.S. 311 (1972).

5. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

Argument.

1. *The Sixth Circuit's Decision is in Direct Conflict with Michigan v. Tyler:* It is respectfully submitted that the Government's footnoted comments on *Tyler* avoid the fundamental conflict between that case and the Sixth Circuit's conflicting decision here. Recognizing this to be a case of first impression under the Mine Safety Act, the Government suggests [in footnote 13] that "initial inspections" by "an inspector", so long as "the purpose of the search remains at least in part to determine if there has been compliance" with the Act, "are similar to 'entries to investigate the cause of the fire' . . . for which the Court found [in *Tyler*] that an administrative warrant would suffice . . . ." Regardless of its accuracy, such a contention is of purely academic interest [and was no doubt relegated to a footnote for that very reason] because both the Government and the Sixth Circuit have repeatedly acknowledged that, from the outset, the searches and seizures involved here were for the *specific and sole purpose of obtaining evidence for a criminal prosecution.*[6]

The acknowledgment of criminal purpose in this case is compelled by the direct involvement of lawyers from the Criminal Division of the Justice Department in the obtainment of the search warrants, the special deputization of United States Marshals to execute the warrants and the fact that the warrants and supporting affidavits themselves state that the Government was seeking evidence of violations of the criminal [as distinguished from the civil] penalty provisions of the Act. (*See, e.g.*, A. [77-557] 52a-55a, 63a-64a.)

6. *United States v. Consolidation Coal Company*, 560 F.2d 214, 216, 216 n.6, 218, 220 (6th Cir. 1977); Gov't. Brief in Opposition at 3-4; Gov't. Brief in Opposition [filed at No. 77-557] at 10 n.8.

Argument.

United States v. Prendergast[7] and *United States v. Goldfine*,[8] referred to by the Government in footnote 13, involve entirely different circumstances. In both cases, the administrative warrants were issued pursuant to the same federal statute[9] specifically authorizing the issuance of such warrants. No statutory authorization for administrative warrants is provided in the Mine Safety Act. Above all, as the *Prendergast* court noted, "there was no commitment [in that case] to criminal prosecution . . . prior to the issuance of an administrative warrant as distinguished from imposition of civil penalties for violation of record keeping requirements."[10] As discussed, in this case the Government was from the beginning committed to a criminal prosecution and the purpose of the searches was to obtain evidence for that prosecution.

In summary, this case presents the situation where the investigating officials believed that a criminal violation had occurred and required "access to gather evidence for a possible prosecution" necessitating the obtainment of a warrant "upon a traditional showing of probable cause applicable to searches for evidence of crime." *Michigan v. Tyler*, 436 U.S. at —, 98 S.Ct. at 1951. Thus, a direct and irreconcilable conflict exists between the Sixth Circuit's decision and this Court's holding in *Tyler* which the Government has not seriously disputed and certiorari should be granted to correct the erroneous court of appeals decision. Although petitioner strongly disagrees with the Government's contention that other

7. 585 F.2d 69 (3d Cir. 1978).
8. 538 F.2d 815 (9th Cir. 1976).
9. 21 U.S.C. § 880.
10. 585 F.2d at 71 n.1.

grounds exist for a denial of certiorari, such a resolution would nonetheless leave standing a conflicting and erroneous holding in the Sixth Circuit.

2. *The Aguilar-Spinelli Test:* In support of its argument that the *Aguilar-Spinelli* test was satisfied, the Government has represented to this Court that the unnamed informant "had been privy to the commission of illegal activities . . ." (p. 7) and that his information was based upon "first-hand observation" and "personal knowledge" (p. 9). Petitioner disagrees with this representation and further submits that it is precisely the lack of specificity as to how the unnamed informant obtained his information concerning the activities of employees at the Georgetown laboratory, located several miles away from his own office at the Franklin 25 mine, which the district court found[11] to be fatal in testing the sufficiency of the affidavits.

It is obvious that the informant did not personally witness any illegal activities and that he had no "personal knowledge" of claimed criminal conduct at the Georgetown laboratory. It was not even shown when the former employee-informant was employed by petitioner so as to be able to determine whether or not his information was stale. By contrast, his own activities at the Franklin 25 mine, as well as the claimed corroborative information obtained by the federal inspector, were, as the district court properly determined, completely "neutral."[12]

---

11. A. [77-557] 41a.
12. A. [77-557]40a.

Furthermore, the failure to indicate in the affidavits how the *unnamed* informant came by his information as to the alleged illegal activities also serves to distinguish this case from the circuit court cases cited by the Government on page 7 of its Brief in Opposition. Each of those cases involved a *named* informant whose information was obtained through personal observation or knowledge because he was either an eyewitness to or a victim of a crime. Such is clearly not the case here.

Nor is the present case analogous to *United States v. Harris,*[13] cited by the Government on pages 7-8. *Harris* involved "personal and recent observations" of criminal activity by the informant, who had also made a declaration against his penal interest. *Harris* did not involve a situation, such as was present in *Spinelli* and in this case, where "the affidavit failed to explain how the informant came by his information."[14]

3. *Warrantless Search:* In another effort to justify the denial of certiorari, the Government alternatively argues that "the searches here could properly have been undertaken without a warrant as a statutorily authorized inspection of a 'pervasively regulated business'" (p. 10). Despite the Government's apparent suggestion to the contrary at p. 14 of its Brief in Opposition, the Sixth Circuit rejected "out of hand" this warrantless search contention, concluding that "only inspections of the *underground* portions or 'active workings' of coal mines [as distinguished from mine offices] may be performed without search warrants under Section 813(a)

---

13. 403 U.S. 573 (1971).
14. *Id.* at 579.

and (b)."[15] Additionally, the Sixth Circuit pointed out that "nothing in the Act authorizes the wholesale seizure of records which took place here."[16]

In the Mine Safety Act, as in the legislation controlling liquor dealers in *Colonnade* and in the Gun Control Act in *Biswell,* Congress selected a standard that did not expressly provide for forcible entry and seizure. Instead, the Government was given a civil remedy of obtaining an injunction whenever an operator refuses to permit inspection of the mine or to furnish requested documents and records.[17] Additionally, civil penalties may be imposed upon those operators refusing entry or access to records.[18] Compare *Colonnade* and *Biswell* where criminal penalties could be imposed for refusal of entry, but as here, forcible entry was not provided for.

Like the liquor dealer in *Colonnade* and the gun seller in *Biswell,* the mine operator may permit the entry and inspection or be subject to coercion and punishment by injunction and civil fines for refusal. The inspectors may not, however, force entry.[19] The Government (p. 11) fails to recognize that the *Colonnade* decision turned upon Congress' failure to provide federal inspectors with a right of *forcible* entry without a warrant

---

15. 560 F.2d at 217 (emphasis original).

16. *Id.*

17. 30 U.S.C. § 818.

18. 30 U.S.C. § 819(a).

19. The *Biswell* defendant, unlike the defendant in *Colonnade,* expressly consented to the entry rather than face criminal prosecution for refusal. By contrast, the forcible entry in *Colonnade,* made despite the defendant's refusal to consent, was struck down.

rather than, as the Government claims, that Congress had not provided for warrantless entries at all.

Here, the searches were accompanied by unauthorized force, to wit, the use of invalid warrants. No consent to these forcible entries was given since submission to an invalid warrant does not constitute consent. *Bumper v. North Carolina,* 391 U.S. 543 (1968).

In any event, as argued at length in the petition for certiorari, a search for criminal evidence is clearly not the equivalent of an administrative inspection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY J. POLITO
ROGER CURRAN
900 Oliver Building
Pittsburgh, Pennsylvania 15222

Counsel for Petitioner